exchange.[10] In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act,[11] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest. The Commission believes that extending the pilot will enable Participants to continue to compile the data necessary for the Commission to determine whether permanent approval of the proposed rule change is appropriate and in the public interest. The Commission further believes that raising the limitation in liability for Satisfaction Orders during the last seven minutes of the trading day from 10 contracts to 25 contracts for this pilot period should help to protect investors and promote the public interest.

The Commission finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of the notice thereof in the **Federal Register**. As noted above, the proposed rule change incorporates changes into ISE Rules that correspond to changes made to the Linkage Plan through Joint Amendment No. 12, which was published for public comment in the **Federal Register** on May 19, 2004.[12] The Commission received no comments in response to publication of Joint Amendment No. 12. The Commission believes that no new issues of regulatory concern are being raised by ISE's proposed rule change. The Commission believes, therefore, that granting accelerated approval of the proposed rule change is appropriate and consistent with Sections 6 and 19(b) of the Act.[13]

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[14] that the proposed rule change (SR–ISE–2004–14) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

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[10] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[11] 15 U.S.C. 78f(b)(5).

[12] *See supra* note 4.

[13] 15 U.S.C. 78f and 78s(b).

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–49881; File No. SR–Phlx–2004–33]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the Philadelphia Stock Exchange, Inc. Relating to Corporate Governance

June 17, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on May 4, 2004, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On June 8, 2004, the Exchange filed Amendment No. 1 to the proposal.[3] On June 15, 2004, the Exchange filed Amendment No. 2 to the proposed rule change.[4] On June 17, 2004, the Exchange filed Amendment No. 3 to the proposed rule change.[5] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Phlx proposes to adopt new Exchange Rule 867, relating to corporate governance standards for listed companies.

Below is the text of the proposed rule change, as amended. Proposed new language is in *italics;* proposed deletions are in brackets.

* * * * *

Rule 849. Audit Committee/Conflicts of Interest

Introductory Note: The requirements set forth in this Rule 849 shall continue to apply pending implementation of Rule 867.

(a)–(k) No Change.

Commentary * * *

(1)–(4) No Change.

867 Corporate Governance

General Application

Companies listed on the Exchange must comply with certain standards regarding corporate governance as codified in this Rule 867. Certain provisions of Rule 867 are applicable to some listed companies but not to others.

Equity Listings

Section 867 applies in full to all companies listing common equity securities, with the following exceptions:

Controlled Companies

A company of which more than 50% of the voting power is held by an individual, a group or another company need not comply with the requirements of Rules 867.01, .04 or .05. A controlled company that chooses to take advantage of any or all of these exemptions must disclose that choice, that it is a controlled company and the basis for the determination in its annual proxy statement or, if the company does not file an annual proxy statement, in the company's annual report on Form 10–K filed with the SEC. Controlled companies must comply with the remaining provisions of Rule 867.

Limited Partnerships and Companies in Bankruptcy—

Due to their unique attributes, limited partnerships and companies in bankruptcy proceedings need not comply with the requirements of Rules 867.01, .04 or .05. However, all limited partnerships (at the general partner level) and companies in bankruptcy proceedings must comply with the remaining provisions of Rule 867.

[1] 15 U.S.C. 78s(b)(l).

[2] 17 CFR 240. 19b–4.

[3] *See* letter from Carla Behnfeldt, Director, New Product Development Group, Phlx, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated June 7, 2004 (''Amendment No. 1''). In Amendment No. 1, the Phlx made certain clarifications with respect to the applicability and compliance dates of the proposed rules, and proposed to restate a provision currently in Phlx Rule 849, regarding Written Affirmations, in proposed new Rule 867.

[4] *See* letter from Carla Behnfeldt, Director, New Product Development Group, Phlx, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated June 14, 2004 (''Amendment No. 2''). In Amendment No. 2, the Phlx clarified that closed-end funds would be required to comply with proposed Rule 867.15, which requires issuers to provide to the Exchange written affirmations regarding certain enumerated audit committee requirements.

[5] *See* letter from Carla Behnfeldt, Director, New Product Development Group, Phlx, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated June 17, 2004 (''Amendment No. 3''). Amendment No. 3 was a technical amendment and is not subject to notice and comment.

Closed-End Funds and Open-End Funds—

The Exchange considers many of the significantly expanded standards and requirements provided for in Rule 867 to be unnecessary for closed-end and open-end management investment companies that are registered under the Investment Company Act of 1940, given the pervasive federal regulation applicable to them. However, registered closed-end funds must comply with the requirements of Rules 867.06, .07(a) and (c), .12 and .15. Note, however, that in view of the common practice to utilize the same directors for boards in the same fund complex, closed-end funds will not be required to comply with the disclosure requirement in the second paragraph of the Commentary to 867.07(a), which calls for disclosure of a board's determination with respect to simultaneous service on more than three public company audit committees. However, the other provisions of that paragraph will apply.

Business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act of 1940 that are not registered under that Act, are required to comply with all of the provisions of Rule 867 applicable to domestic issuers other than Rule 867.02 and .07(b). For purposes of Rules 867.01, .03, .04, .05 and .09, a director of a business development company shall be considered to be independent if he or she is not an ''interested person'' of the company, as defined in Section 2(a)(19) of the Investment Company Act of 1940.

As required by Rule 10A–3 under the Exchange Act, open-end funds (which can be listed as Index Fund Shares) are required to comply with the requirements of Rules 867.06 and .12(b). Rule 10A–3(b)(ii) under the Exchange Act requires that each audit committee must establish procedures for the confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters. In view of the external management structure often employed by closed-end and open-end funds, the Exchange also requires the audit committees of such companies to establish such procedures for the confidential, anonymous submission by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the management company, as well as employees of the management company. This responsibility must be addressed in the audit committee charter.

Other Entities

Except as otherwise required by Rule10A–3 under the Exchange Act (for example, with respect to open-end funds), Rules 867 does not apply to passive business organizations in the form of trusts (such as royalty trusts) or to derivatives and special purpose securities. To the extent that Rule 10A–3 applies to a passive business organization, listed derivative or special purpose security, such entities are required to comply with Rules 867.06 and .12(b).

Foreign Private Issuers

Listed companies that are foreign private issuers (as such term is defined in Rule 3b–4 under the Exchange Act) are permitted to follow home country practice in lieu of the provisions of this Rule 867, except that such companies are required to comply with the requirements of Rule 867.06, .11 and .12(b).

Preferred and Debt Listings

Rule 867 does not generally apply to companies listing only preferred or debt securities on the Exchange. To the extent required by Rule 10A–3 under the Exchange Act, all companies listing only preferred or debt securities on the Phlx are required to comply with the requirements of Rules 867.06 and .12(b).

Effective Dates/Transition Periods

Listed companies will have until the earlier of their first annual meeting after July 15, 2004, or October 31, 2004, to comply with the new standards contained in Rule 867, although if a company with a classified board would be required (other than by virtue of a requirement under Rule 867.06) to change a director who would not normally stand for election in such annual meeting, the company may continue such director in the office until the second annual meeting after such date, but no later than December 31, 2005. In addition, foreign private issuers and small business issuers will have until July 31, 2005, to comply with Rule 867. As a general matter, the existing audit committee requirements provided for in Rule 849 continue to apply to listed companies pending the transition to the new rules.

Companies listing in conjunction with their initial public offering will be permitted to phase in their independent nomination and compensation committees on generally the same schedule as is permitted pursuant to Rule 10A–3 under the Exchange Act for audit committees, that is, one independent member at the time of listing, a majority of independent members within 90 days of listing and fully independent committees within one year. Such companies will be required to meet the majority independent board requirement within 12 months of listing. For purposes of Rule 867 other than sections 867.06 and .12(b), a company will be considered to be listing in conjunction with an initial public offering if, immediately prior to listing, it does not have a class of common stock registered under the Exchange Act. The Exchange will also permit companies that are emerging from bankruptcy or have ceased to be controlled companies within the meaning of Rule 867 to phase in independent nomination and compensation committees and majority independent boards on the same schedule as companies listing in conjunction with an initial public offering. However, for purposes of Rules 867.06 and .12(b), a company will be considered to be listing in conjunction with an initial public offering only if it meets the conditions of Rule 10A–3(b)(1)(iv)(A) under the Exchange Act, namely, that the company was not, immediately prior to the effective date of a registration statement, required to file reports with the SEC pursuant to Section 13(a) or 15(d) of the Exchange Act.

Companies listing upon transfer from another market have 12 months from the date of transfer in which to comply with any requirement to the extent the market on which they were listed did not have the same requirement. To the extent the other market has a substantially similar requirement but also had a transition period from the effective date of that market's rule, which period had not yet expired, the company will have the same transition period as would have been available to it on the other market. This transition period for companies transferring from another market will not apply to the requirements of Rule 867.06 unless a transition period is available pursuant to Rule 10A–3 under the Exchange Act.

References to Form 10–K

There are provisions in this Rule 867 that call for disclosure in a company's Form 10–K under certain circumstances. If a company subject to such a provision is not a company required to file a Form 10–K, then the provision shall be interpreted to mean the annual periodic disclosure form that the company does file with the SEC. For example, for a closed-end fund, the appropriate form would be the annual Form N–CSR. If a company is not required to file either an annual proxy statement or an annual periodic report with the SEC, the disclosure shall be made in the annual

report required under Rule 837, Annual Reports.

1. Listed companies must have a majority of independent directors.

Commentary: Effective boards of directors exercise independent judgment in carrying out their responsibilities. Requiring a majority of independent directors will increase the quality of board oversight and lessen the possibility of damaging conflicts of interest.

2. In order to tighten the definition of ''independent director'' for purposes of these standards:

(a) No director qualifies as ''independent'' unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company). Companies must disclose these determinations.

Commentary: It is not possible to anticipate, or explicitly to provide for, all circumstances that might signal potential conflicts of interest, or that might bear on the materiality of a director's relationship to a listed company (references to ''company'' would include any parent or subsidiary in a consolidated group with the company). Accordingly, it is best that boards making ''independence'' determinations broadly consider all relevant facts and circumstances. In particular, when assessing the materiality of a director's relationship with the company, the board should consider the issue not merely from the standpoint of the director, but also from that of persons or organizations with which the director has an affiliation. Material relationships can include commercial, industrial, banking, consulting, legal, accounting, charitable and familial relationships, among others. However, as the concern is independence from management, the Exchange does not view ownership of even a significant amount of stock, by itself, as a bar to an independence finding.

The basis for a board determination that a relationship is not material must be disclosed in the company's annual proxy statement or, if the company does not file an annual proxy statement, in the company's annual report on Form 10–K filed with the SEC. In this regard, a board may adopt and disclose categorical standards to assist it in making determinations of independence and may make a general disclosure if a director meets these standards. Any determination of independence for a director who does not meet these standards must be specifically explained. A company must disclose any standard it adopts. It may then make the general statement that the independent directors meet the standards set by the board without detailing particular aspects of the immaterial relationships between individual directors and the company. In the event that a director with a business or other relationship that does not fit within the disclosed standards is determined to be independent, a board must disclose the basis for its determination in the manner described above. This approach provides investors with an adequate means of assessing the quality of a board's independence and its independence determinations while avoiding excessive disclosure of immaterial relationships.

(b) In addition:

(i) A director who is an employee, or whose immediate family member is an executive officer, of the company is not independent until three years after the end of such employment relationship.

Commentary: Employment as an interim Chairman or CEO shall not disqualify a director from being considered independent following that employment.

(ii) A director who receives, or whose immediate family member receives, more than $100,000 per year in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service), is not considered independent until three years after he or she ceases to receive more than $100,000 per year in such compensation.

Commentary: Compensation received by a director for former service as an interim Chairman or CEO need not be considered in determining independence under this test. Compensation received by an immediate family member for service as a non-executive employee of the listed company need not be considered in determining independence under this test.

(iii) A director who is affiliated with or employed by, or whose immediate family member is affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the company is not ''independent'' until three years after the end of the affiliation or the employment or auditing relationship.

(iv) A director who is employed, or whose immediate family member is employed, as an executive officer of another company where any of the listed company's present executives serve on that company's compensation committee is not ''independent'' until three years after the end of such service or the employment relationship.

(v) A director who is an executive officer or an employee, or whose immediate family member is an executive officer, of company that makes payments to, or receives payments from, the listed company for property or services in an amount which, in any single fiscal year, exceeds the greater of $200,000 ($1 million if the listed company is also listed on the New York Stock Exchange), or 5% of such other company's consolidated gross revenues, is not ''independent'' until three years after falling below such threshold.

Commentary: In applying the test in Rule 867.02(b)(v), both the payments and the consolidated gross revenues to be measured shall be those reported in the last completed fiscal year. The look-back provision for this test applies solely to the financial relationship between the listed company and the director or immediate family member's current employer; a listed company need not consider former employment of the director or immediate family member.

Charitable organizations shall not be considered ''companies'' for purposes of Rule 867.02(b)(v), provided however that a listed company shall disclose in its annual proxy statement, or if the listed company does not file an annual proxy statement, in the company's annual report on Form 10–K filed with the SEC, any charitable contributions made by the listed company to any charitable organization in which a director serves as an executive officer if, within the preceding three years, contributions in any single fiscal year exceeded the greater of $200,000 ($1 million if the listed company is also listed on the New York Stock Exchange), or 5% of such charitable organization's consolidated gross revenues. Listed company boards are reminded of their obligations to consider the materiality of any such relationship in accordance with Rule 867.02(a) above.

General Commentary to Rule 867.02(b): An ''immediate family member'' includes a person's spouse, parents, children, siblings, mothers and fathers-in-law, sons and daughters-in-law, brothers and sisters-in-law, and anyone (other than domestic employees) who shares such person's home. When applying the look-back provisions in Rule 867.02(b), listed companies need not consider individuals who are no longer immediate family members as a result of legal separation or divorce, or those who have died or become

incapacitated. In addition, references to the ''company'' would include any parent or subsidiary in a consolidated group with the company.

Transition Rule. Each of the above standards contains a three-year ''look-back'' provision. In order to facilitate a smooth transition to the new independence standards, the Exchange will phase in the ''look-back'' provisions by applying only a one-year look-back for the first year after adoption of these new standards. The three-year look-backs provided for in Rule 867.02(b) will begin to apply only from June 17, 2005 (the ''Three-Year Look-Back Date''). As an example, until the Three-Year Look-Back Date, a company need look back only one year when testing compensation under Rule 867.02(b)(ii). Beginning on the Three-Year Look-Back Date, however, the company would need to look back the full three years provided in Rule 867.02(b)(ii).

3. To empower non-management directors to serve as a more effective check on management, the non-management directors of each company must meet at regularly scheduled executive sessions without management.

Commentary: To promote open discussion among the non-management directors, companies must schedule regular executive sessions in which those directors meet without management participation. ''Non-management'' directors are all those who are not company officers (as that term is defined in Rule 16a–1(f) under the Securities Act of 1933), and includes such directors who are not independent by virtue of a material relationship, former status or family membership, or for any other reason.

Regular scheduling of such meetings is important not only to foster better communication among non-management directors, but also to prevent any negative inference from attaching to the calling of executive sessions. There need not be a single presiding director at all executive sessions of the non-management directors. If one director is chosen to preside at these meetings, his or her name must be disclosed in the company's annual proxy statement or, if the company does not file an annual proxy statement, in the company's annual report on Form 10–K filed with the SEC. Alternatively, a company may disclose the procedure by which a presiding director is selected for each executive session. For example, a company may wish to rotate the presiding position among the chairs of board committees.

In order that interested parties may be able to make their concerns known to the non-management directors, a company must disclose a method for such parties to communicate directly with the presiding director or with the non-management directors as a group. Companies may, if they wish, utilize for this purpose the same procedures they have established to comply with the requirements of Rule 10A–3(b)(3) under the Exchange Act, as applied to listed companies through Rule 867.06.

While this Rule 867.03 refers to meetings of non-management directors, if that group includes directors who are not independent under this Rule 867, listed companies should at least once a year schedule an executive session including only independent directors.

4. (a) Listed companies must have a nominating/corporate governance committee composed entirely of independent directors.

(b) The nominating/corporate governance committee must have a written charter that addresses:

(i) *The committee's purpose and responsibilities—which, at minimum, must be to: Identify individuals qualified to become board members, consistent with criteria approved by the board, and to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders; develop and recommend to the board a set of corporate governance principles applicable to the corporation; and oversee the evaluation of the board and management; and*

(ii) An annual performance evaluation of the committee.

Commentary: A nominating/corporate governance committee is central to the effective functioning of the board. New director and board committee nominations are among a board's most important functions. Placing this responsibility in the hands of an independent nominating/corporate governance committee can enhance the independence and quality of nominees. The committee is also responsible for taking a leadership role in shaping the corporate governance of a corporation.

If a company is legally required by contract or otherwise to provide third parties with the ability to nominate directors (for example, preferred stock rights to elect directors upon a dividend default, shareholder agreements, and management agreements), the selection and nomination of such directors need not be subject to the nominating committee process.

The nominating/corporate governance committee charter should also address the following items: Committee member qualifications; committee member appointment and removal; committee structure and operations (including authority to delegate to subcommittees); and committee reporting to the board. In addition, the charter should give the nominating/corporate governance committee sole authority to retain and terminate any search firm to be used to identify director candidates, including sole authority to approve the search firm's fees and other retention terms.

Boards may allocate the responsibilities of the nominating/corporate governance committee to committees of their own denomination, provided that the committees are composed entirely of independent directors. Any such committee must have a published committee charter.

5. (a) Listed companies must have a compensation committee composed entirely of independent directors.

(b) The compensation committee must have a written charter that addresses:

(i) The committee's purpose and responsibilities—which, at minimum, must be to have direct responsibility to:

(A) Review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives, and either as a committee or together with the other independent directors (as directed by the board), determine and approve the CEO's compensation level based on this evaluation; and

(B) Make recommendations to the board with respect to non-CEO compensation, incentive-compensation plans and equity-based plans; and

(C) Produce a compensation committee report on executive compensation as required by the SEC to be included in the company's annual proxy statement or annual report on Form 10–K filed with the SEC;

(ii) An annual performance evaluation of the compensation committee.

Commentary: In determining the long-term incentive component of CEO compensation, the committee should consider the company's performance and relative shareholder return, the value of similar incentive awards to CEOs at comparable companies, and the awards given to the listed company's CEO in past years. To avoid confusion, note that the compensation committee is not precluded from approving awards (with or without ratification of the board) as may be required to comply with applicable tax laws.

The compensation committee charter should also address the following items: Committee member qualifications; committee member appointment and removal; committee structure and operations (including authority to

delegate to subcommittees); and committee reporting to the board.

Additionally, if a compensation consultant is to assist in the evaluation of director, CEO or senior executive compensation, the compensation committee charter should give that committee sole authority to retain and terminate the consulting firm, including sole authority to approve the firm's fees and other retention terms.

Boards may allocate the responsibilities of the compensation committee to committees of their own denomination, provided that the committees are composed entirely of independent directors. Any such committee must have a published committee charter.

Nothing in this provision should be construed as precluding discussion of CEO compensation with the board generally, as it is not the intent of this standard to impair communication among members of the board.

6. Listed companies must have an audit committee that satisfies the requirements of Rule 10A–3 under the Exchange Act.

Commentary: The Exchange will apply the requirements of Rule 10A–3 in a manner consistent with the guidance provided by the Securities and Exchange Commission in SEC Release No. 34–47654 (April 1, 2003). Without limiting the generality of the foregoing, the Exchange will provide companies the opportunity to cure defects provided in Rule 10A–3(a)(3) under the Exchange Act.

7. (a) The audit committee must have a minimum of three members.

Commentary: Each member of the audit committee must be financially literate, as such qualification is interpreted by the company's board in its business judgment, or must become financially literate within a reasonable period of time after his or her appointment to the audit committee. In addition, at least one member of the audit committee must have accounting or related financial management expertise, as the company's board interprets such qualification in its business judgment. While the Exchange does not require that a listed company's audit committee include a person who satisfies the definition of audit committee financial expert set out in Item 401(h) of Regulation S–K, a board may presume that such a person has accounting or related financial management expertise.

Because of the audit committee's demanding role and responsibilities, and the time commitment attendant to committee membership, each prospective audit committee member should evaluate carefully the existing demands on his or her time before accepting this important assignment. Additionally, if an audit committee member simultaneously serves on the audit committees of more than three public companies, and the listed company does not limit the number of audit committees on which its audit committee members serve, then in each case, the board must determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee and disclose such determination in the company's annual proxy statement or, if the company does not file an annual proxy statement, in the company's annual report on Form 10–K filed with the SEC.

(b) In addition to any requirement of Rule 10A–3(b)(1), all audit committee members must satisfy the requirements for independence set out in Rule 867.02.

(c) The audit committee must have a written charter that addresses:

(i) The committee's purpose—which, at minimum, must be to:

(A) Assist board oversight of (1) the integrity of the company's financial statements, (2) the company's compliance with legal and regulatory requirements, (3) the independent auditor's qualifications and independence, and (4) the performance of the company's internal audit function and independent auditors; and

(B) Prepare an audit committee report as required by the SEC to be included in the company's annual proxy statement;

(ii) An annual performance evaluation of the audit committee; and

(iii) *The duties and responsibilities of the audit committee—which, at a minimum, must include those set out in Rule 10A–3(b)(2), (3), (4) and (5) of the Exchange Act, as well as to:*

(A) At least annually, obtain and review a report by the independent auditor describing: The firm's internal quality-control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and (to assess the auditor's independence) all relationships between the independent auditor and the company;

Commentary: After reviewing the foregoing report and the independent auditor's work throughout the year, the audit committee will be in a position to evaluate the auditor's qualifications, performance and independence. This evaluation should include the review and evaluation of the lead partner of the independent auditor. In making its evaluation, the audit committee should take into account the opinions of management and the company's internal auditors (or other personnel responsible for the internal audit function). In addition to assuring the regular rotation of the lead audit partner as required by law, the audit committee should further consider whether, in order to assure continuing auditor independence, there should be regular rotation of the audit firm itself. The audit committee should present its conclusions with respect to the independent auditor to the full board.

(B) Discuss the company's annual audited financial statements and quarterly financial statements with management and the independent auditor, including the company's disclosures under ''Management's Discussion and Analysis of Financial Condition and Results of Operations'';

(C) Discuss the company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies;

Commentary: The audit committee's responsibility to discuss earnings releases as well as financial information and earnings guidance may be done generally i.e., discussion of the types of information to be disclosed and the type of presentation to be made). The audit committee need not discuss in advance each earnings release or each instance in which a company may provide earnings guidance.

(D) Discuss policies with respect to risk assessment and risk management;

Commentary: While it is the job of the CEO and senior management to assess and manage the company's exposure to risk, the audit committee must discuss guidelines and policies to govern the process by which this is handled. The audit committee should discuss the company's major financial risk exposures and the steps management has taken to monitor and control such exposures. The audit committee is not required to be the sole body responsible for risk assessment and management, but, as stated above, the committee must discuss guidelines and policies to govern the process by which risk assessment and management is undertaken. Many companies, particularly financial companies, manage and assess their risk through mechanisms other than the audit committee. The processes these companies have in place should be reviewed in a general manner by the

audit committee, but they need not be replaced by the audit committee.

(E) Meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function) and with independent auditors;

Commentary: To perform its oversight functions most effectively, the audit committee must have the benefit of separate sessions with management, the independent auditors and those responsible for the internal audit function. As noted herein, all listed companies must have an internal audit function. These separate sessions may be more productive than joint sessions in surfacing issues warranting committee attention.

(F) Review with the independent auditor any audit problems or difficulties and management's response;

Commentary: The audit committee must regularly review with the independent auditor any difficulties the auditor encountered in the course of the audit work, including any restrictions on the scope of the independent auditor's activities or on access to requested information, and any significant disagreements with management. Among the items the audit committee may want to review with the auditor are: Any accounting adjustments that were noted or proposed by the auditor but were ''passed'' (as immaterial or otherwise); any communications between the audit team and the audit firm's national office respecting auditing or accounting issues presented by the engagement; and any ''management'' or ''internal control'' letter issued, or proposed to be issued, by the audit firm to the company. The review should also include discussion of the responsibilities, budget and staffing of the company's internal audit function.

(G) Set clear hiring policies for employees or former employees of the independent auditors; and

Commentary: Employees or former employees of the independent auditor are often valuable additions to corporate management. Such individuals' familiarity with the business, and personal rapport with the employees, may be attractive qualities when filling a key opening. However, the audit committee should set hiring policies taking into account the pressures that may exist for auditors consciously or subconsciously seeking a job with the company they audit.

(H) Report regularly to the board of directors.

Commentary: The audit committee should review with the full board any issues that arise with respect to the quality or integrity of the company's financial statements, the company's compliance with legal or regulatory requirements, the performance and independence of the company's independent auditors, or the performance of the internal audit function.General Commentary to Rule 867.07(c): While the fundamental responsibility for the company's financial statements and disclosures rests with management and the independent auditor, the audit committee must review: (A) Major issues regarding accounting principles and financial statement presentations, including any significant changes in the company's selection or application of accounting principles, and major issues as to the adequacy of the company's internal controls and any special audit steps adopted in light of material control deficiencies; (B) analyses prepared by management and/or the independent auditor setting forth significant financial reporting issues and judgments made in connection with the preparation of the financial statements, including analyses of the effects of alternative GAAP methods on the financial statements; (C) the effect of regulatory and accounting initiatives, as well as off-balance sheet structures, on the financial statements of the company; and (D) the type and presentation of information to be included in earnings press releases (paying particular attention to any use of ''pro forma,'' or ''adjusted'' non-GAAP, information), as well as review any financial information and earnings guidance provided to analysts and rating agencies.

(d) Each listed company must have an internal audit function.

Commentary: Listed companies must maintain an internal audit function to provide management and the audit committee with ongoing assessments of the company's risk management processes and system of internal control. A company may choose to outsource this function to a third party service provider other than its independent auditor.

General Commentary to Rule 867.07: To avoid any confusion, note that the audit committee functions specified in Rule 867.07 are the sole responsibility of the audit committee and may not be allocated to a different committee.

8. Requirements relating to shareholder approval of equity compensation plans and broker voting are set forth in Rule 850.

9. Listed companies must adopt and disclose corporate governance guidelines.

Commentary: No single set of guidelines would be appropriate for every company, but certain key areas of universal importance include director qualifications and responsibilities, responsibilities of key board committees, and director compensation. Given the importance of corporate governance, each listed company's website must include its corporate governance guidelines and the charters of its most important committees (including at least the audit, and if applicable, compensation and nominating committees). Each company's annual report on Form 10-K filed with the SEC must state that the foregoing information is available on its website, and that the information is available in print to any shareholder who requests it. Making this information publicly available should promote better investor understanding of the company's policies and procedures, as well as more conscientious adherence to them by directors and management,

The following subjects must be addressed in the corporate governance guidelines:

- *Director qualification standards. These standards should, at minimum, reflect the independence requirements set forth in Rules 867.01 and .02. Companies may also address other substantive qualification requirements, including policies limiting the number of boards, on which a director may sit, and director tenure, retirement and succession.*
- *Director responsibilities. These responsibilities should clearly articulate what is expected from a director, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials.*
- *Director access to management and, as necessary and appropriate, independent advisors.*
- *Director compensation. Director compensation guidelines should include general principles for determining the form and amount of director compensation (and for reviewing those principles, as appropriate). The board should be aware that questions as to directors' independence may be raised when directors' fees and emoluments exceed what is customary. Similar concerns may be raised when the company makes substantial charitable contributions to organizations in which a director is affiliated, or enters into consulting contracts with (or provides other indirect forms of compensation to) a director. The board should critically evaluate each of these matters when determining the form and amount of*

director compensation, and the independence of a director.

• *Director orientation and continuing education.*

• *Management succession. Succession planning should include policies and principles for CEO selection and performance review, as well as policies regarding succession in the event of an emergency or the retirement of the CEO.*

• *Annual performance evaluation of the board. The board should conduct a self-evaluation at least annually to determine whether it and its committees are functioning effectively.*

10. Listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers.

Commentary: No code of business conduct and ethics can replace the thoughtful behavior of an ethical director, officer or employee. However, such a code can focus the board and management on areas of ethical risk, provide guidance to personnel to help them recognize and deal with ethical issues, provide mechanisms to report unethical conduct, and help to foster a culture of honesty and accountability.

Each code of business conduct and ethics must require that any waiver of the code for executive officers or directors may be made only by the board or a board committee and must be promptly disclosed to shareholders. This disclosure requirement should inhibit casual and perhaps questionable waivers, and should help assure that, when warranted, a waiver is accompanied by appropriate controls designed to protect the company. It will also give shareholders the opportunity to evaluate the board's performance in granting waivers. Each code of business conduct and ethics must also contain compliance standards and procedures that will facilitate the effective operation of the code. These standards should ensure the prompt and consistent action against violations of the code. Each listed company's website must include its code of business conduct and ethics. Each company's annual report on Form 10–K filed with the SEC must state that the foregoing information is available on its website and that the information is available in print to any shareholder who requests it. Each company may determine its own policies, but all listed companies should address the most important topics, including the following:

• *Conflicts of interest. A ''conflict of interest'' occurs when an individual's private interest interferes in any way—or even appears to interfere—with the interests of the corporation as a whole. A conflict situation can arise when an employee, officer or director takes actions or has interests that may make it difficult to perform his or her company work objectively and effectively. Conflicts of interest also arise when an employee, officer or director, or a member of his or her family, receives improper personal benefits as a result of his or her position in the company. Loans to, or guarantees of obligations of, such persons are of special concern. The company should have a policy prohibiting such conflicts of interest, and providing a means for employees, officers and directors to communicate potential conflicts to the company.*

• *Corporate opportunities. Employees, officers and directors should be prohibited from (a) taking for themselves personally opportunities that are discovered through the use of corporate property, information or position; (b) using corporate property, information, or position for personal gain; and (c) competing with the company. Employees, officers and directors owe a duty to the company to advance its legitimate interests when the opportunity to do so arises.*

• *Confidentiality. Employees, officers and directors should maintain the confidentiality of information entrusted to them by the company or its customers, except when disclosure is authorized or legally mandated. Confidential information includes all non-public information that might be of use to competitors, or harmful to the company or its customers, if disclosed.*

• *Fair dealing. Each employee, officer and director should endeavor to deal fairly with the company's customers, suppliers, competitors and employees. None should take unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any other unfair-dealing practice. Companies may write their codes in a manner that does not alter existing legal rights and obligations of companies and their employees, such as ''at will'' employment arrangements.*

• *Protection and proper use of company assets. All employees, officers and directors should protect the company's assets and ensure their efficient use. Theft, carelessness and waste have a direct impact on the company's profitability. All company assets should be used for legitimate business purposes.*

• *Compliance with laws, rules and regulations (including insider trading laws). The company should proactively promote compliance with laws, rules and regulations, including insider trading laws. Insider trading is both unethical and illegal, and should be dealt with decisively.*

• *Encouraging the reporting of any illegal or unethical behavior. The company should proactively promote ethical behavior. The company should encourage employees to talk to supervisors, managers or other appropriate personnel when in doubt about the best course of action in a particular situation. Additionally, employees should report violations of laws, rules, regulations or the code of business conduct to appropriate personnel. To encourage employees to report such violations, the company must ensure that employees know that the company will not allow retaliation for reports made in good faith.*

11. Listed foreign private issuers must disclose any significant ways in which their corporate governance practices differ from those followed by domestic companies under Phlx listing standards.

Commentary: Foreign private issuers must make their U.S. investors aware of the significant ways in which their home-country practices differ from those followed by domestic companies under Phlx listing standards. However, foreign private issuers are not required to present a detailed, item-by-item analysis of these differences. Such a disclosure would be long and unnecessarily complicated. Moreover, this requirement is not intended to suggest that one country's corporate governance practices are better or more effective than another. The Exchange believes that U.S. shareholders should be aware of the significant ways that the governance of a listed foreign private issuer differs from that of a U.S. listed company. The Exchange underscores that what is required is a brief, general summary of the significant differences, not a cumbersome analysis.

Listed foreign private issuers may provide this disclosure either on their web site (provided it is in the English language and accessible from the United States) and/or in their annual report as distributed to shareholders in the United States (again, in the English language). If the disclosure is only made available on the web site, the annual report shall so state and provide the web address at which the information may be obtained.

12. (a) Each listed company CEO must certify to the Phlx each year that he or she is not aware of any violation by the company of Phlx corporate governance listing standards.

Commentary: The CEO's annual certification to the Phlx that, as of the

date of certification, he or she is unaware of any violation by the company of Phlx's corporate governance listing standards will focus the CEO and senior management on the company's compliance with the listing standards. Both this certification to the Phlx, and any CEO/CFO certifications required to be filed with the SEC regarding the quality of the company's public disclosure, must be disclosed in the company's annual report to shareholders or, if the company does not prepare an annual report to shareholders, in the companies annual report on Form 10–K filed with the SEC.

(b) Each listed company CEO must promptly notify the Phlx after any executive officer of the listed company becomes aware of any material non-compliance with any applicable provisions of this Rule 867.

13. The Phlx may issue a public reprimand letter to any listed company that violates a Phlx listing standard.

Commentary: Suspending trading in or delisting a company can be harmful to the very shareholders that the Phlx listing standards seek to protect; the Phlx must therefore use these measures sparingly and judiciously. For this reason it is appropriate for the Phlx to have the ability to apply a lesser sanction to deter companies from violating its corporate governance (or other) listing standards. Accordingly, the Phlx may issue a public reprimand letter to any listed company, regardless of type of security listed or country of incorporation, that it determines has violated a Phlx listing standard. For companies that repeatedly or flagrantly violate Phlx listing standards, suspension and delisting remain the ultimate penalties. For clarification, this lesser sanction is not intended for use in the case of companies that fall below the financial and other continued listing standards set forth in Rules 803, 804 and 805, or that fail to comply with the audit committee standards set out in Rule 867.06. The processes and procedures provided for in Rule 811, Delisting Policies and Procedures, govern the treatment of companies falling below those standards.

14. Related Party Transactions. Each issuer shall conduct an appropriate review of all related party transactions on an ongoing basis and all such transactions must be approved by the company's audit committee or another independent body of the board of directors. For purposes of this rule, the term ''related party transaction'' shall refer to transactions required to be disclosed pursuant to SEC Regulation S-K, Item 404.

15. Written Affirmation. As part of the initial listing process, and with respect to any subsequent changes to the composition of the audit committee, and otherwise approximately once each year, each company should provide the Exchange written confirmation regarding:

(i) Any determination that the company's board of directors has made regarding the independence of directors pursuant to Section 867.02 above;

(ii) The financial literacy of the audit committee members as required by Section 867.07 above;

(iii) The determination that at least one of the audit committee members has accounting or related financial management expertise as required by Section 867.07 above; and

(iv) The annual review and reassessment of the adequacy of the audit committee charter as required by Section 867.07 above.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Phlx included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Phlx has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Phlx states that the purpose of the proposed rule change is to adopt new Rule 867, Corporate Governance, to conform with corporate governance rules recently approved by the Commission for the New York Stock Exchange (''NYSE'').

On November 4, 2003, the Commission approved SR–NYSE–2002–33, a proposed rule change amending the NYSE Listed Company Manual to implement significant changes to NYSE's listing standards that were aimed to ensure the independence of directors of listed companies and to strengthen corporate governance practices of listed companies.[6] In the approval order, the Commission stated that in 1998, the NYSE and National Association of Securities Dealers, Inc. (''NASD'') sponsored a committee to study the effectiveness of audit committees. This committee became known as the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees (''Blue Ribbon Committee''). In its 1999 report, the Blue Ribbon Committee recognized the importance of audit committees and issued ten recommendations to enhance their effectiveness. Additionally, in February 2002, in light of several high-profile corporate failures, the Commission's Chairman at that time requested that the NYSE and NASD, as well as the other exchanges, including Phlx, review their listing standards, with an emphasis this time on all corporate governance listing standards, and not just those provisions relating to audit committees.

In January 2003, pursuant to the Sarbanes-Oxley Act of 2002 (''Sarbanes-Oxley Act''), the Commission proposed Rule 10A–3 under the Exchange Act, which directs each national securities exchange and national securities association to prohibit the listing of any security of an issuer that is not in compliance with the audit committee requirements specified in that rule. The Commission adopted Rule 10A–3 in April 2003. As noted above, on November 4, 2003, the Commission approved the rule changes set forth in SR-NYSE–2002–33, including rule changes made in compliance with the requirements of Rule 10A–3, as well as additional, extensive changes to other aspects of the NYSE's corporate governance listing standards.

On November 25, 2003, the Commission approved a Phlx proposed rule change filed by the Exchange in compliance with the audit committee listing standards required by Rule 10A–3 under the Act.[7] That rule change also included additional requirements, but generally did not change Phlx's listing standards other than listing standards applicable to audit committees. The Exchange is now proposing amendments to its listing standards to conform, for the most part, to the listing standards adopted by the NYSE in SR–NYSE–2002–33. Those listing standards cover a range of corporate governance matters beyond those applicable to audit committees. However, the Phlx is also proposing to amend its audit committee

[6] *See* Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (approving changes to the corporate governance listing standards of the Nasdaq Stock Market, Inc. and the NYSE).

[7] *See* Securities Exchange Act Release No. 48836 (November 25, 2003), 68 FR 67719 (December 3, 2003) (SR–Phlx–2003–51).

standards, in the interest of conforming more closely to those of the NYSE. The Phlx believes that aligning its listing standards more closely with the NYSE's will facilitate compliance by most of Phlx's listed companies, which are currently also listed at the NYSE.

According to the Phlx, the listing standards proposed herein are designed to further the ability of honest and well-intentioned directors, officers, and employees of listed issuers to perform their functions effectively. The Phlx believes that the proposal should also allow shareholders to more easily and efficiently monitor the performance of companies and directors in order to reduce instances of lax and unethical behavior. A summary of the proposal is set forth below. The applicability of certain requirements is subject to the exceptions discussed at the end of this section.

Independence of Majority of Board Members

Phlx Rule 867.01 generally would require the board of directors of each listed company to consist of a majority of independent directors.[8] Pursuant to Phlx Rule 867.02, no director would qualify as ''independent'' unless the board affirmatively determines that the director has no material relationship with the company (either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company). The company would be required to disclose the basis for such determination in its annual proxy statement or, if the company does not file an annual proxy statement, in the company's annual report on Form 10–K filed with the Commission. In complying with this requirement, a board would be permitted to adopt and disclose standards to assist it in making determinations of independence, disclose those standards, and then make the general statement that the independent directors meet those standards.

Definition of Independent Director

In addition, in proposed Rule 867.02(G), the Phlx would tighten its current definition of independent director as follows. First, a director who is an employee, or whose immediate family member is an executive officer, of the company would not be independent until three years after the end of such employment relationship. Employment as an interim Chairman or CEO would not disqualify a director from being considered independent following that employment.

Second, a director who receives, or whose immediate family member receives, more than $100,000 per year in direct compensation from the listed company, except for certain permitted payments, would not be independent until three years after he or she ceases to receive more than $100,000 per year in such compensation.

Third, a director who is affiliated with or employed by, or whose immediate family member is affiliated with or employed in a professional capacity by, a present or former internal or external auditor of the company would not be independent until three years after the end of the affiliation or the employment or auditing relationship.

Fourth, a director who is employed, or whose immediate family member is employed, as an executive officer of another company where any of the listed company's present executives serve on that company's compensation committee would not be independent until three years after the end of such service or the employment relationship.

Fifth, a director who is an executive officer or an employee, or whose immediate family member is an executive officer, of a company that makes payments to, or receives payments from, the listed company for property or services in an amount which, in any single fiscal year, exceeds the greater of $200,000 ($1 million if the listed company is also listed on the NYSE), or 5% of such other company's consolidated gross revenues, would not be independent until three years after falling below such threshold. Charitable organizations would not be considered ''companies'' for purposes of this provision, provided that the listed company discloses in its annual proxy statement, or if the listed company does not file an annual proxy statement, in its annual report on Form 10–K filed with the Commission, any charitable contributions made by the listed company to any charitable organization in which a director serves as an executive officer if, within the preceding three years, such contributions in any single year exceeded the greater of $200,000 ($1 million if the listed company is also listed on the NYSE) or 5% of the organization's consolidated gross revenues. Additionally, both the payments and the consolidated gross revenues to be measured would need to be those reported in the last completed fiscal year. The look-back provision would apply solely to the financial relationship between the listed company and the director or immediate family member's current employer. A listed company would not need to consider former employment of the director or immediate family member.

For purposes of these provisions, ''immediate family member'' would be defined to include a person's spouse, parents, children, siblings, mothers- and fathers-in-law, sons- and daughters-in-law, brothers- and sisters-in-law, and anyone (other than domestic employees) who shares such person's home. References to ''company'' would include any parent or subsidiary in a consolidated group with the company.

The Exchange further proposes to phase in the look-back requirements discussed above by applying a one-year look-back for the first year after adoption of these new standards. The three-year look-back periods would begin to apply from the date that is the first anniversary of Commission approval of the proposed rule change.

Separate Meetings for Board Members

The Exchange proposes to require the non-management directors of each Phlx-listed company to meet at regularly scheduled executive sessions without management.[9]

In addition, listed companies would be required to disclose a method for interested parties to communicate directly with the presiding director of such executive sessions, or with the non-management directors as a group. Companies would be permitted to utilize the same procedures they have established to comply with Rule 10A–3(b)(3) under the Act.

Nominating/Corporate Governance Committee

The Exchange proposes to require each listed company to have a nominating/corporate governance committee composed entirely of independent directors.[10] Such committee would be required to have a written charter that addresses, among other items, the committee's purpose and responsibilities, and an annual performance evaluation of the nominating/corporate governance committee. The Exchange further proposes to clarify that the committee would be required to identify individuals qualified to become board members, consistent with the criteria approved by the board, and to select, or to recommend that the board select, the director nominees for the next annual meeting of shareholders, among other

[8] *See infra* note 19 and accompanying text regarding entities excepted from this requirement.

[9] *See id.*

[10] *See id.*

responsibilities that would be required to be specified by the committee charter.

Compensation Committee

The Exchange proposes to require each listed company to have a compensation committee composed entirely of independent directors.[11] Such committee would be required to have a written charter that addresses, among other items, the committee's purpose and responsibilities—which would need to include, at a minimum, specified responsibilities with respect to compensation of the Chief Executive Officer (''CEO''), among other responsibilities—and an annual performance evaluation of the compensation committee. The compensation committee also would be required to produce a compensation committee report on executive compensation, as required by Commission rules to be included in the company's annual proxy statement or annual report on Form 10–K filed with the Commission. Further, the Exchange proposes to add a provision to the commentary on this section indicating that discussion of CEO compensation with the board generally is not precluded.

Audit Committee

Under the proposal, Exchange Rules 867.06, 867.07, 867.12(b), 867.14, and 867.15 would replace and supersede current Rule 849. As noted above, the Exchange is proposing to adopt the same format and language used by the NYSE in order to facilitate compliance by Phlx-listed companies that are also listed on the NYSE.[12]

a. Composition

Proposed Rules 867.06 and 867.07 would require each Phlx-listed company to have a minimum three-person audit committee composed entirely of directors that meet the independence standards of both Exchange Rule 867.02, discussed above, and Commission Rule 10A–3. The Phlx also proposes to add the following commentary: ''The Exchange will apply the requirements of Rule 10A–3 in a manner consistent with the guidance provided by the Securities and Exchange Commission in SEC Release No. 34–47654 (April 1, 2003). Without limiting the generality of the foregoing, the Exchange will provide companies with the opportunity to cure defects provided in Rule 10A–3(a)(3).''

In addition, the Commentary to Exchange Rule 867.07(a) would require that each member of the audit committee be financially literate, as such qualification is interpreted by the board in its business judgment, or become financially literate within a reasonable period of time after his or her appointment to the audit committee. In addition, at least one member of the audit committee would be required to have accounting or related financial management expertise, as the company's board interprets such qualification in its business judgment. The Exchange also proposes to clarify that while the Exchange does not require that a listed company's audit committee include a person who satisfies the definition of audit committee financial expert set forth in Item 401(e) of Regulation S–K, a board may presume that such a person has accounting or related financial management experience.

If an audit committee member simultaneously serves on the audit committee of more than three public companies, and the listed company does not limit the number of audit committees on which its audit committee members serve, each board would be required to determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee and to disclose such determination.

b. Audit Committee Charter and Responsibilities

Exchange Rule 867.07(c) would require the audit committee of each listed company to have a written audit committee charter that addresses: (i) The committee's purpose, including certain specified aspects of such purpose; (ii) an annual performance evaluation of the audit committee; and (iii) the duties and responsibilities of the audit committee.

The rule would specify the duties and responsibilities of the audit committee that must be addressed in the audit committee charter. These would include, at a minimum, those set out in Rule 10A–3(b)(2), (3), (4) and (5), as well as the responsibility to annually obtain and review a report by the independent auditor; discuss the company's annual audited financial statement and quarterly financial statements with management and the independent auditor; discuss the company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies; discuss policies with respect to risk assessment and risk management; meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function), and with independent auditors; review with the independent auditors any audit problems or difficulties and management's response; set clear hiring policies for employees or former employees of the independent auditors; and report regularly to the board.

The Written Affirmation requirements in current Phlx Rule 849 would be restated in proposed new Rule 867.15.[13]

Internal Audit Function

Exchange Rule 867.07(d) generally would require each listed company to have an internal audit function.[14]

Cross Reference to Shareholder Approval of Equity Compensation Plans

New Rule 867.08 would cross-reference Exchange Rule 850, which governs requirements relating to shareholder approval of equity compensation plans and broker voting.[15]

Corporate Governance Guidelines

Exchange Rule 867.09 generally would require each listed company to adopt and disclose corporate governance guidelines.[16] The following topics would be required to be addressed: Director qualification standards; director responsibilities; director access to management and, as necessary and appropriate, independent advisors; director compensation; director orientation and continuing education; management succession; and annual performance evaluation of the board. Each company's website would be required to include its corporate governance guidelines and the charters of its most important committees, and the availability of this information on the website or in print to shareholders would need to be referenced in the company's annual report on Form 10–K filed with the Commission.

Code of Business Conduct and Ethics

Exchange Rule 867.10 generally would require each listed company to adopt and disclose a code of business conduct and ethics for directors, officers and employees, and to promptly disclose any waivers of the code for directors or executive officers.[17] The commentary to this section would set forth the most important topics that should be addressed, including conflicts

[11] *See id.*

[12] *See also infra* note 19 and accompanying text regarding applicability of these requirements.

[13] *See* Amendment No. 1.

[14] *See infra* note 19 and accompanying text.

[15] Exchange Rule 850 was recently amended. *See* Securities Exchange Act Release No. 48736 (October 31, 2003), 68 FR 63180 (November 7, 2003).

[16] *See infra* note 19 and accompanying text.

[17] *See id.*

of interest; corporate opportunities; confidentiality of information; fair dealing; protection and proper use of company assets; compliance with laws, rules and regulations (including insider trading laws); and encouraging the reporting of any illegal or unethical behavior. Each code would be required to contain compliance standards and procedures to facilitate the effective operation of the code. Each listed company's website would be required to include its code of business conduct and ethics, and the availability of the code on the website or in print to shareholders would need to be referenced in the company's annual report on Form 10–K filed with the Commission.

CEO Certification

Exchange Rule 867.12(a) would require the CEO of each listed company to certify to the Exchange each year that he or she is not aware of any violation by the company of the Exchange's corporate governance listing standards.[18] This certification would be required to be disclosed in the company's annual report or, if the company does not prepare an annual report to shareholders, in the company's annual report on Form 10–K filed with the Commission.

In addition, Exchange Rule 867.12(b) would require the CEO of each listed company to promptly notify the Phlx in writing after any executive officer of the listed company becomes aware of any material non-compliance with any applicable provisions of the new requirements.

Public Reprimand Letter

Exchange Rule 867.13 would allow the Phlx to issue a public reprimand letter to any listed company that violates a Phlx listing standard.

Exceptions to the Phlx Corporate Governance Proposals [19]

The Exchange proposes to exempt any listed company of which more than 50% of the voting power is held by an individual, a group, or another company (''Controlled Company'') from the requirements that its board have a majority of independent directors, and that the company have nominating/corporate governance and compensation committees composed entirely of independent directors. A company that chose to take advantage of any or all of these exemptions would be required to disclose that choice, that it is a Controlled Company, and the basis for the determination in its annual proxy statement or, if the company does not file an annual proxy statement, in the company's annual report on Form 10–K filed with the Commission. Limited partnerships and companies in bankruptcy proceedings also would be exempt from requirements that the board have a majority of independent directors and that the issuer have nominating/corporate governance and compensation committees composed entirely of independent directors.

The Exchange considers many of the requirements of proposed Rule 867 to be unnecessary for closed-end and open-end management investment companies that are registered under the Investment Company Act of 1940 (''Investment Company Act''), given the pervasive federal regulation applicable to them. However, the Exchange proposes that registered closed-end management investment companies (''closed-end funds'') would be required to: (1) Have a minimum three-member audit committee that satisfies the requirements of Rule 10A–3 under the Act and meets the requirements of proposed Phlx Rule 867.07(a); (2) comply with the requirements of the proposed Phlx Rule 867.07(c) concerning audit committee charter requirements; and (3) comply with the certification and notification provisions regarding non-compliance, as well as the written affirmation requirements. Closed-end funds would be excluded from the disclosure requirement relating to an audit committee member's simultaneous service on more than three audit committees, but would be subject to the requirement for the board to determine that such simultaneous service would not impair the ability of such member to effectively serve on the listed company's audit committee.

The Phlx also proposes to require business development companies, which are a type of closed-end management investment company defined in Section 2(a)(48) of the Investment Company Act that are not registered under the Investment Company Act, to comply with all the provisions of Phlx Section 867 applicable to domestic issuers, except that the directors of such companies, including audit committee members, would not be required to satisfy the independence requirements set forth in Phlx Section 867.02 and 867.07(b). For purposes of Phlx Sections 867.01, .03, .04, .05, and .09, a director of a business development company would be considered to be independent if he or she is not an ''interested person'' of the company, as defined in Section 2(a)(19) of the Investment Company Act.

Open-end management investment companies (''open-end funds''), which can be listed as Index Fund Shares, would be required to: (1) Have an audit committee that satisfies the requirements of Rule 10A–3 under the Act, and (2) notify the Exchange in writing of any material non-compliance.

In addition, the Exchange proposes to require the audit committees of closed-end and open-end funds to establish procedures for the confidential, anonymous submission by employees of the investment adviser, administrator, principal underwriter, or any other provider of accounting related services for the investment company, as well as employees of the investment company, of concerns regarding questionable accounting or auditing matters. This responsibility would be required to be addressed in the audit committee charter.

The Exchange proposes that except as otherwise required by Rule 10A–3 under the Act, the new requirements also would not apply to passive business organizations in the form of trusts (such as royalty trusts) or to derivatives and special purpose securities. To the extent that Rule 10A–3 applies to a passive business organization, listed derivative, or special purpose security, the requirement to have an audit committee that satisfies the requirements of Rule 10A–3, and the requirement to notify the Phlx in writing of any material non-compliance, also would apply.

The new requirements generally would not apply to companies listing only preferred or debt securities on the Exchange. To the extent required by Rule 10A–3, however, all companies listing only preferred or debt securities on the Exchange would be required to: (1) Have an audit committee that satisfies the requirements of Rule 10A–3, and (2) notify the Exchange in writing of any material non-compliance.

Application to Foreign Private Issuers

Exchange Rule 867 would permit Phlx-listed companies that are foreign private issuers, as such term is defined in Rule 3b–4 under the Act, to follow home country practice in lieu of the new requirements, except that such companies would be required to: (1) Have an audit committee that satisfies the requirements of Rule 10A–3 under the Act; (2) notify the Exchange in writing after any executive officer becomes aware of any non-compliance with any applicable provision; and (3) provide a brief, general summary of the significant ways in which its

[18] *See id.*

[19] *See* the ''General Applicability'' section in the text of proposed Rule 867.

governance differs from those followed by domestic companies under Exchange listing standards. Listed foreign private issuers would be permitted to provide this disclosure either on their website (provided it is in the English language and accessible from the United States) and/or in their annual report as distributed to shareholders in the United States. If the disclosure is made available only on the website, the annual report would be required to state this and provide the web address at which the information may be obtained.

Proposed Implementation of New Requirements

Listed companies would have until the earlier of their first annual meeting after July 15, 2004, or October 31, 2004, to comply with the new standards.[20] However, if a company with a classified board is required to change a director who would not normally stand for election in such annual meeting, the company would be permitted to continue such director in office until the second annual meeting after such date, but no later than December 31, 2005.

Notwithstanding the foregoing, foreign private issuers and small business issuers would have until July 31, 2005, to comply with Rule 867.

Companies listing in conjunction with their initial public offering would be required to have one independent member at the time of listing, a majority of independent members within 90 days of listing, and fully independent committees within one year. They would be required to meet the majority of independent board requirement within 12 months of listing.

Companies listing upon transfer from another market would have 12 months from the date of transfer in which to comply with any requirement to the extent the market on which they were listed did not have the same requirement. To the extent the other market has a substantially similar requirement but also had a transition period from the effective date of that market's rule, which period had not yet expired, the company would have the same transition period as would have been available to it on the other market. This transition period for companies transferring from another market would not apply to the audit committee requirements of Rule 10A–3 unless a transition period is available under Rule 10A–3.

2. Statutory Basis

The Exchange believes that the proposed rule change, as amended, is consistent with Section 6 of the Act[21] in general and furthers the objectives of Section 6(b)(5)[22] in particular in that it is designed, among other things, to facilitate transactions in securities, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest, and does not permit unfair discrimination among issuers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change, as amended, will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange did not receive any written comments on the proposed rule change.

III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2004–33 on the subject line.

Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609.

All submissions should refer to File Number SR–Phlx–2004–33. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the Phlx. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2004–33 and should be submitted on or before July 15, 2004.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[23] In

[20] The requirements set forth in current Rule 849 would continue to apply pending implementation of Rule 867. By the terms of Rule 849, listed issuers (other than small business issuers and foreign private issuers) are required to be in compliance with the applicable requirements set forth in Rules 849(b)–(j) and Commentary Sections (1)–(4) of Rule 849 by the earlier of the listed issuer's first annual shareholders meeting after January 15, 2004 or October 31, 2004. The expanded corporate governance provisions of Rule 867—including paragraphs (6), (7), 12(b), (14), and (15), which replace and supersede Rule 849—begin to apply (for listed issuers other than small business issuers and foreign private issuers) the earlier of the listed issuer's first annual shareholders meeting after July 15, 2004, or October 31, 2004. Thus, listed issuers whose first annual shareholder meeting after January 15, 2004 is held subsequent to July 15, 2004 would be required to be in compliance with the provisions of Rule 867 (rather than the aforementioned provisions of Rule 849) by the time of such annual meeting, but in any event no later than October 31, 2004. Listed issuers whose first annual shareholder meeting after January 15, 2004 is held before July 15, 2004, and thus are required to comply with Rule 849(b)–(j) and Commentary Sections (1)–(4) by the date of such annual meeting, would be required to be in compliance with the expanded, superseding provisions of Rule 867 beginning on October 31, 2004. For small business issuers and foreign private issuers, Rule 867 would supersede Rule 849(b)–(j) and Commentary Sections (1)–(4) and begin to apply on July 31, 2005. The first sentence of Rule 849 will continue to apply to all listed companies until Rule 849(b)–(j) and Commentary Sections (1)–(4) or Rule 867 become applicable.

[21] 15 U.S.C. 78f(b).

[22] 15 U.S.C. 78f(b)(5).

[23] 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rule's

Continued

particular, the Commission finds that the proposed rule change, as amended, is consistent with Section 6(b)(5) of the Act[24] in that it is designed, among other things, to facilitate transactions in securities, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and does not permit unfair discrimination among issuers.

In the Commission's view, the proposed rule change, as amended, will foster greater transparency, accountability, and objectivity in the oversight by, and decision-making processes of, the boards and key committees of Phlx-listed issuers. The proposal, as amended, also will promote compliance with high standards of conduct by the issuers' directors and management. The Commission notes that the Phlx has designed its proposal in a way that largely harmonizes it with rule changes recently approved by the Commission for other self-regulatory organizations.[25]

The Phlx has requested that the Commission grant accelerated approval to the proposed rule change. The Commission believes that the proposed rule change will significantly align the corporate governance standards proposed for companies listed on the Phlx with the standards approved by the Commission for companies listed on other SROs. The Commission believes it is appropriate to accelerate approval of the proposed rule change so that the comprehensive set of strengthened corporate governance standards for companies listed on the Phlx may be implemented on generally the same timetable (with some modification of certain deadlines) as that for similar standards adopted for issuers listed on other SROs. The Commission therefore finds good cause, consistent with Section 19(b)(2) of the Act,[26] to approve the proposed rule change, as amended, prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**.

impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[24] 15 U.S.C. 78f(b)(5).

[25] *See, e.g.,* Securities Exchange Act Release No. 48745 (November 4, 2003), 68 FR 64154 (November 12, 2003) (approving changes to the corporate governance listing standards of the Nasdaq Stock Market, Inc. and the NYSE).

[26] 15 U.S.C. 78s(b)(2).

V. Conclusion

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[27] that the proposed rule change (SR–Phlx–2004–33), as amended, is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[28]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 04–14287 Filed 6–23–04; 8:45 am]

BILLING CODE 8010–01–P

[27] 15 U.S.C. 78s(b)(2).

[28] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of reporting requirements submitted for OMB review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Submit comments on or before July 26, 2004. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

Copies: Request for clearance (OMB 83–1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

ADDRESSES: Address all comments concerning this notice to: Agency Clearance Officer, Jacqueline White, Small Business Administration, 409 3rd Street, SW., 5th Floor, Washington, DC 20416; and *David_Rostker@omb.eop.gov*, fax number (202) 395–7285 Office of Information and Regulatory Affairs, Office of Management and Budget.

FOR FURTHER INFORMATION CONTACT: Jacqueline White, Agency Clearance Officer, (202) 205–7044.

Title: Size Standards Declaration.

No.: 480.

Frequency: On occasion.

Description of Respondents: SBIC Financing Reports.

Responses: 4,200.

Annual Burden: 4,200.

Jacqueline K. White,

Chief, Administrative Information Branch.

[FR Doc. 04–14332 Filed 6–23–04; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Reporting and Recordkeeping Requirements Under OMB Review

AGENCY: Small Business Administration.

ACTION: Notice of reporting requirements submitted for OMB review.

SUMMARY: Under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35), agencies are required to submit proposed reporting and recordkeeping requirements to OMB for review and approval, and to publish a notice in the **Federal Register** notifying the public that the agency has made such a submission.

DATES: Submit comments on or before July 26, 2004. If you intend to comment but cannot prepare comments promptly, please advise the OMB Reviewer and the Agency Clearance Officer before the deadline.

Copies: Request for clearance (OMB 83–1), supporting statement, and other documents submitted to OMB for review may be obtained from the Agency Clearance Officer.

ADDRESSES: Address all comments concerning this notice to: Agency Clearance Officer, Jacqueline White, Small Business Administration, 409 3rd Street, SW., 5th Floor, Washington, DC 20416; and *David_Rostker@omb.eop.gov*, fax number (202) 395–7285 Office of Information and Regulatory Affairs, Office of Management and Budget.

FOR FURTHER INFORMATION CONTACT: Jacqueline White, Agency Clearance Officer, (202) 205–7044.

Title: Stockholders Confirmation (Corporation); Ownership Confirmation (Partnership).

No.: 1405, 1405A.

Frequency: On occasion.

Description of Respondents: Newly Licensed SBICs.

Responses: 600.

Annual Burden: 600.

Jacqueline K. White,

Chief, Administrative Information Branch.

[FR Doc. 04–14333 Filed 6–23–04; 8:45 am]

BILLING CODE 8025–01–P